Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02(NCvC)(A)-2533–12 OF 2018
MARY LIM, HAS ZANAH MEHAT AND VAZEER ALAM JJCA
13 OCTOBER 2020

Road Traffic — Insurance — Notice of proceedings — Respondent filed tort action against rider and owner of motorcycle — Appellant as insurer obtained declaratory order pursuant to s 96(3) of Road Transport Act 1987 nullifying insurance policy — Appellant failed to notify respondent regarding declaratory order — Respondent obtained declaratory order to the effect that appellant's declaratory order void and unenforceable against respondent — Whether service of notice under s 96(3) of the Road Transport Act 1987 was mandatory or otherwise — Road Transport Act 1987 s 96(3)

The respondent, riding motorcycle No PDY 5157, was involved in an accident with motorcycle No PGG 9569 which was insured with the appellant, an insurance company. The respondent filed a civil action ('the civil action') against the rider and owner of motorcycle No PGG 9569 and obtained judgment in his favour. Pending the disposal of the civil action, vide an originating summons ('the originating summons'), the appellant was granted a declaratory order pursuant to s 96(3) of the Road Transport Act 1987 ('the Act') nullifying the relevant insurance policy under which the appellant would have been obliged to honour ('the first declaration'). The respondent, who was not notified and/or served with the cause papers in the originating summons, was granted a declaratory order to the effect that the first declaration was void and unenforceable as against him ('the second declaration'). The High Court ordered the appellant, as the insurer to pay the judgment sum obtained by the respondent in the civil action. Aggrieved by the decision, the appellant filed the present appeal. The issue for determination was whether the service of the notice under s 96(3) of the Act was mandatory or otherwise.

Held, dismissing the appeal with costs:

(1) Section 96(3) of the Act, especially the proviso, seeks to safeguard the interests and rights of third parties; that they must be notified and told of the grounds upon which the validity of the insurance policy was impugned. Since it was an uncontroverted fact that the appellant did not serve, name or even notify the respondent of the proceedings which led to them procuring the first declaration, where such failure or omission clearly contravened the mandatory requirements of the proviso to s 96(3)

of the Act, the appellant was not entitled to the benefit of s 96(3) of the Act and the learned judge was perfectly entitled to allow the respondent's application and grant the second declaration in the terms sought (see paras 62–63).

(2) The High Court was not bound by the decision of *Letchumanan* and *Kumari Nadason* as these cases were of no application and in any event were distinguishable. The High Court was, of course, entitled to follow the Court of Appeal decision of *Rasip Hamsudi*. In fact, it was bound by that decision by virtue of the doctrine of stare decisis (see paras 66–67).

[Bahasa Malaysia summary

Responden, yang menunggang motosikal No PDY 5157, terlibat dalam kemalangan dengan motosikal No PGG 9569 yang diinsuranskan dengan perayu, sebuah syarikat insurans. Responden memfailkan tindakan sivil ('tindakan sivil tersebut') terhadap penunggang dan pemilik motosikal No PGG 9569 dan memperoleh keputusan yang berpihak kepadanya. Sementara menunggu keputusan tindakan sivil tersebut, melalui saman pemula ('saman pemula tersebut'), perayu diberikan perintah perisytiharan menurut s 96(3) Akta Pengangkutan Jalan 1987 ('Akta') membatalkan polisi insurans yang berkaitan yang sepatutnya dipenuhi oleh perayu ('deklarasi pertama'). Responden, yang tidak diberi notis dan/atau diserahkan dengan kertas-kertas kausa berkaitan dengan saman pemula tersebut, diberikan perintah perisytiharan yang menyatakan bahawa deklarasi pertama adalah tidak sah dan tidak dapat dilaksanakan terhadapnya ('deklarasi kedua'). Mahkamah Tinggi memerintahkan perayu, sebagai penanggung insurans untuk membayar jumlah penghakiman yang diperoleh responden dalam tindakan sivil tersebut. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa. Isu untuk penentuan adalah sama ada penyampaian notis di bawah s 96(3) Akta adalah wajib atau sebaliknya.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 96(3) Akta, terutamanya bahagian proviso, bertujuan untuk melindungi kepentingan dan hak pihak ketiga; bahawa mereka mesti diberikan notis dan diberitahu mengenai alasan-alasan di mana kesahihan polisi insurans tersebut dipersoalkan. Memandangkan ia adalah fakta yang tidak dapat disangkal bahawa perayu tidak menyampaikan kepada responden, menamakan responden atau memberikan notis kepada responden mengenai prosiding yang menyebabkan mereka memperoleh deklarasi pertama, di mana kegagalan atau peninggalan tersebut jelas melanggar syarat wajib di bawah peruntukan s 96(3) Akta tersebut, perayu tidak berhak mendapat manfaat di bawah s 96(3) Akta dan hakim yang bijaksana berhak sepenuhnya untuk membenarkan permohonan responden dan

memerintahkan deklarasi kedua seperti yang dituntut (lihat perenggan 62–63).

(2) Mahkamah Tinggi tidak terikat dengan keputusan *Letchumanan* dan *Kumari Nadason* kerana kes-kes ini tidak terpakai dan dalam keadaan apa pun boleh dibezakan dengan kes semasa. Mahkamah Tinggi tentunya berhak mengikuti keputusan Mahkamah Rayuan *Rasip Hamsudi*. Sebenarnya, ia terikat dengan keputusan tersebut berdasarkan doktrin stare decisis (lihat perenggan 66–67).]

Cases referred to

Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Co (M) Bhd [2015] 6 MLJ 223, CA (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (refd)

Iskandar bin Mohd Nuli v AmGeneral Insurance Bhd (previously known as AmG Insurance Bhd) [2017] 5 MLJ 25, FC (refd)

Kumarasamy Pillai Govindaraju @ K Govindaraju a/l Kumarasamy Pillai & Ors v Vijayasundaram a/l Sambantham Mudaliar & Anor (Vegadachalam a/l Palaniappen, intervener) [2010] 4 MLJ 567, HC (refd)

Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 6 MLJ 788, CA (distd)

Pacific & Oriental Insurance Co Bhd v Azhar bin Azizan (Mohd Ashraf Yusoff, as intervener) [2015] 10 MLJ 532, HC (distd)

Pacific & Orient Insurance Co Bhd v Hameed Jagubar bin Syed Ahmad [2018] 12 MLJ 1, FC (refd)

Pacific & Orient Insurance Co Bhd v Kamacheh a/p Karuppen [2015] 4 MLJ 218, CA (refd)

Pacific & Orient Insurance Co Berhad v Kumari a/p Nadason & Anor [2014] MLJU 1864; [2014] MLRAU 535, CA (distd)

Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)

Pacific & Orient Insurance Berhad v Rasip bin Hamsudi & Ors [2017] MLJU 1019; [2017] 2 MLRA 659, HC (folld)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (refd)

Puncak Permata Sdn Bhd (under creditors' voluntary liquidation) v Tham Weng Hong & Anor [2011] 5 MLJ 78, CA (refd)

Legislation referred to

Road Transport Act 1987 ss 96, 96(1), (2), (3)
Rules of Court 2012 O 15 r 6

Appeal from: Originating Summons No KA-24NCVC-391–04 of 2018 (High Court, Alor Setar)

R Kamalanathan (Vinod R Kamalanathan with him) (Vinod Kamalanathan & Assoc) for the appellant.
Rajan Ayappan (G Naidu with him) (Mano Veera & Co) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] The appellant was granted a declaratory order pursuant to s 96(3) of the Road Transport Act 1987 (vide Originating Summons No WA-24NcVC-110–03 of 2016) nullifying the relevant insurance policy under which the appellant would have been obliged to honour (the declaration). The respondent, who was not notified and/or served with the cause papers in that originating summons, was granted a declaratory order to the effect that the declaration is void and unenforceable as against him. The High Court granted a consequential order that the appellant, as insurer of the vehicle involved in the motor-vehicle accident wherein the respondent was injured, do pay the judgment sum obtained by the respondent against the insured in Kulim Magistrates Court Summons No A54KJ-178–11 of 2018. The appellant appealed.

[2] Unanimously, we dismissed the appeal after finding that there was no appealable error warranting appellate intervention.

RELEVANT BACKGROUND

[3] The respondent, riding motorcycle No PDY 5157, was involved in an accident with motorcycle No PGG 9569 which was insured with the appellant, an insurance company. The respondent sued the rider and owner of motorcycle No PGG 9569 at Kulim Magistrates Court Summons No A54KJ-178–11 of 2018. The appellant appointed solicitors to represent the rider and owner in that claim.

[4] The appellant subsequently discharged themselves after obtaining the declaration mentioned at the outset. The respondent's civil claim then proceeded to trial; culminating with judgment being entered in his favour on 29 November 2016.

[5] The respondent was however, unsuccessful in obtaining payment from the appellant. He then filed an originating summons seeking a declaratory order to the effect that the declaration is void and unenforceable as against him.

[6] The appellant opposed the application arguing that it was not obliged to honour the claim or the judgment on ground of fraud; that the respondent's recourse was to enforce the judgment solely against the rider and owner of motorcycle No PGG 9569. The appellant admitted that it did not serve any

notice of its application under s 96(3) of the RTA 1987, whether on the respondent or on insured, the rider and/or owner of motorcycle No PGG 9569.

[7] The learned judge disagreed with the appellant; finding that on account of the appellant's failure to serve a notice under the proviso to s 96(3) of the RTA 1987 before commencement of its originating summons, the appellant was not entitled to the protection of the declaration. The learned judge disagreed with the appellant that the notification requirement in s 96(3) was merely directory.

OUR DECISION

[8] There are at least four earlier decisions of this court relevant to the issue that confronts us in this appeal, and that is, whether the service of the notice under s 96(3) of the RTA 1987 is mandatory or otherwise. These decisions are said to be inconsistent with each other. Quite coincidentally, all four decisions involve the same appellant insurance company. It would appear that the issue at hand continuously and regularly vexes the insurance industry, especially the appellant.

[9] The appellant relied on *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 ('Letchumanan') and *Pacific & Oriental Insurance Co Bhd v Azhar bin Azizan (Mohd Ashraf Yusoff, as intervener)* [2015] 10 MLJ 532 ('Azhar'); while the respondent relied on *Pacific & Orient Insurance Co Berhad v Kumari a/p Nadason & Anor* [2014] MLJU 1864; [2014] MLRAU 535 ('Kumari Nadason') and *Pacific & Orient Insurance Berhad v Rasip bin Hamsudi & Ors* [2017] MLJU 1019; [2017] 2 MLRA 659 ('Rasip Hamsudi').

[10] Then, there are the following decisions which are in some way relevant to the issues at hand; namely the Federal Court decision in *Pacific & Orient Insurance Co Bhd v Hameed Jagubar bin Syed Ahmad* [2018] 12 MLJ 1; and the Court of Appeal decisions in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947; *Pacific & Orient Insurance Co Bhd v Kamacheh a/p Karuppen* [2015] 4 MLJ 218; and *Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Co (M) Bhd* [2015] 6 MLJ 223. We shall deal with all these decisions in turn.

[11] The material law is s 96 which reads as follows:

> *96 Duty of insurers to satisfy judgments against persons insured in respect of third party risks*
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> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such

liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

(2) No sum shall be payable by an insurer under subsection (1) —

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings;

(b) in respect of any judgment, so long as execution is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either —

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate as delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) *No sum shall be payable* by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained from the court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action *shall not thereby become entitled to the benefit* of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action *unless*, before or within seven days after the commencement of that action, he has *given notice* thereof to the person who is the plaintiff in the said proceedings *specifying the grounds* on which he proposes to rely and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto. (Emphasis added.)

[12] The learned judge had held that the terms of s 96(3) were clear in that the insurer, that is, the appellant must give notice to the respondent, within seven days of commencing their action for a declaration under the section (the originating summons). Where the insurer has failed to give such requisite

notice, then any declaration obtained will be of no use to the insurer to avoid their liability under s 96(1).

[13] Or, in the words of the proviso to s 96(3), the insurer, the appellant 'shall not thereby become entitled to the benefit of this subsection'. The 'benefit of this subsection' refers to the benefit in s 96(3) — that the insurer is under no duty to pay any judgment sum mentioned in s 96(1). But for a declaration obtained under the terms of s 96(3), an insurer (the appellant) is under a duty imposed by statute under s 96(1), to pay the judgment sum to third parties, such as the respondent.

[14] Having given s 96 of the RTA 1987 serious and careful consideration, we agree with the learned judge's construction of that provision and the decision reached.

[15] From the memorandum of appeal and the submissions of the appellant, the principal complaints are these:

(a) there was no liability for the appellant to meet since 'this is a fraudulent claim';

(b) the evidence of fraud was not hearsay but based on personal statutory declaration of the rider of the insured's motorcycle No PGG 9569, and the report of the adjuster;

(c) even if such evidence was hearsay, it was permissible in affidavit evidence;

(d) since fraud was alleged, the originating summons ought to have been converted into a writ action;

(e) the High Court was not entitled to follow the Court of Appeal decision of *Rasip Hamsudi* as another panel of the Court of Appeal had 'refused' to follow that decision;

(f) the High Court was bound by the decision of *Letchumanan*;

(g) in view of the Federal Court decision in *Iskandar bin Mohd Nuli v AmGeneral Insurance Bhd (previously known as AmG Insurance Bhd)* [2017] 5 MLJ 25, the appellant's liability is found only within the confines of the policy and no liability can be attached outside its scope;

(h) since the appellant had disclaimed liability, the respondent must file recovery proceedings against the insured and adduce viva voce evidence to prove his claim against the insured;

(i) the appellant concedes that the declaration has nothing to do with its liability to pay the respondent;

(j) the appellant accepts that the declaration is only binding between itself and the insured and has no effect on the respondent who is a third party claimant;

(k) following *Kumari Nadason*, the declaration is not binding on the respondent in which case the respondent is entitled by law to file recovery proceedings against the insured;

(l) upon grant of the declaration, the appellant had immediately instructed its solicitors to discharge themselves from further defending the insured/rider at the Kulim Magistrates Court; and

(m) following the Court of Appeal decision in *AmGeneral Insurance Bhd v Iskandar bin Mohd Nuli* which held that 'there was a commonality of interest' between the appellant and the insured for the appellant to continue to defend to mitigate both liability and quantum notwithstanding its denial of liability, the appellant resumed defence/representation at the Kulim Magistrates Court, even after grant of the declaration.

[16] With respect, the submissions of the appellant are seriously flawed in several respects.

[17] First, whether the respondent retains a right to recover or enforce any judgment pronounced in his favour against the rider and/or owner of motorcycle PGG 9569 is not in question. That right is not under examination; neither has that right been called into question even in the case authorities cited by the appellant. What is in question and of relevance in the context of s 96 of the RTA 1987 is the liability of the appellant as 'the insurer' specified in that provision, to satisfy such judgments obtained by third parties, that is, third parties in relation to the policy or contract of insurance.

[18] Section 96 imposes a statutory duty or obligation on the appellant as insurers to satisfy judgments against persons insured in respect of third party risks. The scope and intent of s 96 has been extensively discussed in *Letchumanan*, a decision relied on by the appellant.

[19] In *Letchumanan*, the Court of Appeal opined at para 26 that 'if the insurers refuse to satisfy the judgments, then the plaintiffs — be it the dependents or injured victims of the tortfeasors' negligence, have a legal right under s 96(1) of the RTA to file a writ against the insurers'. At para 29, the Court of Appeal further pointed out that s 96 'allows a party who has no contractual relationship with the insurers and who has no claim in tort against the insurers to file a suit against the insurers'. In other words, s 96 seeks to reinforce the rights of third parties to claim against the appellant, the insurer.

[20] We adopt those views.

[21] However, the context and circumstances there are entirely different from those presented in this appeal. In *Letchumanan*, the plaintiff in the motor-vehicle claim, after judgment was entered in his favour, sued the insurance company in separate proceedings under s 96(1) of the RTA 1987. The insurance company resisted the claim, pleading its obligations were circumscribed by particular clauses on coverage in the insurance policy. The sessions court rejected the defence and allowed Letchumanan's claim against the insurance company. The decision was reversed on appeal at the High Court.

[22] At the Court of Appeal, Letchumanan's appeal was dismissed. The Court of Appeal made the aforementioned observations before concluding that the doctrine of res judicata, the issue that was before the court there, did not apply to prevent the insurance company from contesting liability. The Court of Appeal was of the view that the liability action against the tortfeasor and the recovery action against the insurance company were 'distinct from each other'; the former founded in tort whereas the latter was a statutory right under the RTA 1987.

[23] The Court of Appeal in *Letchumanan* felt for this reason it would be 'unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue as the recovery action stage'.

[24] It is however, pertinent to note that in *Letchumanan*, the insurance company did not approach the court for a declaration under s 96(3). It appears to have set it up as a defence (see paras 4, 14 and 21), with the Court of Appeal remarking at para 21 that the insurance company was seeking, in the appeal, 'to declare that the policy as against the deceased, is unenforceable due to the exception in its terms'. This issue remains alive and was brought up on appeal to the High Court and now before us'. And, because the insurance company was not a party to the litigation or tort action, there was no final determination of the scope of coverage of the policy; that the issue was not caught by the principle of res judicata in which case, it was only 'just and common sense' that the insurance company be allowed to raise the issue in the recovery action.

[25] Although the Court of Appeal affirmed the High Court's finding that the insurance company was not liable in the recovery action, its decision was not based on an application of s 96(3) of the RTA 1987, but of s 96(1). It is also important to note that the third party, Letchumanan, who had initiated the tort claim, had opportunity to litigate, submit and deal with the grounds upon which the policy was avoided, before the insurance company succeeded in its defence. As is apparent from the facts in the present appeal, that vital

opportunity was not made available to the respondent for reasons best known to the appellant since the application for the declaration was commenced when the appellant was fully aware of the claim at the Kulim Magistrates Court.

[26] With respect, the appellant's reliance on *Letchumanan* is therefore, misplaced. That decision is not direct and relevant authority on the interpretation and application of s 96(3).

[27] Neither is the other High Court decision of *Azhar* relied on by the appellant. We understand that the decision has been affirmed on appeal and the application for leave to the Federal Court was dismissed. The only grounds available are those of the High Court.

[28] In *Azhar*, the insurance company had, on 14 May 2013, obtained a declaration to the effect that the relevant insurance policy was revoked and of no effect. Vide encl 7 filed after that declaration had been granted, Mohd Ashraf Yusoff, the plaintiff who had sued the driver (Azhar) and insured (Sidek bin Deros) at the Sungai Petani Sessions Court for injuries sustained in a motorvehicle accident, applied to intervene in the declaration proceedings well after the order had already been granted. The application was made under O 15 r 6 of the Rules of Court 2012.

[29] The application to intervene was dismissed. The learned judge applied the Federal Court decision in *Hong Leong Bank Bhd* (formerly known as *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622), and the Court of Appeal decision in *Puncak Permata Sdn Bhd (under creditors' voluntary liquidation) v Tham Weng Hong & Anor* [2011] 5 MLJ 78; holding that 'the application must be made before judgment, otherwise the proceedings have already been concluded and that there is no longer a proceeding in existence for the party to intervene in, and the judge had also become functus officio'.

[30] In simple terms, Mohd Ashraf Yusoff was too late.

[31] The learned judge was not prepared to re-open the issue, and at para 25 of the judgment, remarked that there was 'no evidence before this court to prove that the order made by this court on 14 May 2013 is null and void on the ground of illegality or lack of jurisdiction'.

[32] As we understand, for reasons of completeness, the learned judge went on to give his views on s 96, opining that 's 96(1) has to be read with s 96(3) and the proviso thereto; ... that the insurers need to obtain a declaration from the court that the relevant insurance policy is void or unenforceable 'before the date the liability is incurred' in s 96(3)'. His Lordship further opined that 'the

A date the liability is incurred' as stated in s 96(3) refers to the date 'liability incurred as a result of a judgment handed down by a court of competent jurisdiction' or when liability is pronounced by the court and 'not liability incurred as a result of the accident in question' or when the accident occurred. The learned judge reasoned that 'the latter is vague and uncertain especially in
B regards to contribution (if any) and quantum' — see para 27.

[33] According to the learned judge, Mohd Ashraf Yusoff had 'legal interest' to intervene only 'if and when he has obtained judgment against the insured
C after which date if the insurer intends to apply to declare the policy void and unenforceable against the insured, the insurer would also have to serve all the cause papers on the interned intervener. Once the intended intervenor had obtained judgment against the insured, he therefore would then have a legal right to intervene as he could then claim a legal interest in the insurers
D application for a declaration (as regards legal interest see *Kumarasamy Pillai Govindaraju @ K Govindaraju a/l Kumarasamy Pillai & Ors v Vijayasundaram a/l Sambantham Mudaliar & Anor (Vegadachalam a/l Palaniappen, intervener)* [2010] 4 MLJ 567 and *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52)'.

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[34] Since the declaratory order obtained by the insurance company was before the date of the pronouncement of judgment at the Sungai Petani Sessions Court, Mohd Ashraf Yusoff had no legal interest; in which case there was no obligation on the part of the insurers to serve the cause papers relating
F to the matter between the insured and the insurer upon the intended intervenor.

[35] We are aware that the learned judge did go on to opine at para 36 that 'it is the court's finding that if and when the intended intervenor did obtain
G judgment against the insured it could then proceed to recover the judgment it had obtained by the recovery action against the insurer by virtue of s 96(1). With the declaratory order, the insurer could seek reimbursement from the insured of the judgment sum as and when it is paid to the intended intervenor'.

H **[36]** That opinion may well be correct if the particular factual scenario calls for such course of action or conduct; though it does seem somewhat peculiar given that the insurer had already obtained a declaratory order nullifying the policy in question (under s 96(3)), an order which we understand as one which seeks, quite precisely to discharge or release the insurer from the statutory duty
I imposed under s 96(1) to satisfy judgments obtained by a third party. The circumstances referred to in para 30 where the insurer seeks reimbursement from the insured of any judgment sum paid to a third party must, in our view, refer to where the insurer satisfies a judgment presented by the third party, regardless the declaratory order.

[37] But, that is entirely different from the present appeal. Not only is the appellant resisting the duty imposed under s 96(1) of the RTA 1987, it has procured a declaratory order that the policy in question is void and unenforceable. And, it has procured such declaratory order, the declaration, without meeting the notice requirements set out in the proviso to s 96(3). The terms of s 96(3), especially the notice requirements were not discussed at all in *Azhar*; neither was it discussed or dealt with in *Letchumanan*; and this point was picked up by the Court of Appeal in *Rasip Hamsudi* which we will discuss shortly.

[38] With respect, those decisions are clearly distinguishable and while are of assistance to understanding the intent of s 96, it must be readily appreciated that much depends on the factual circumstances, the orders sought and the sequence of events involved.

[39] Our views on *Azhar* remain unchanged and unqualified regardless of the fact that the decision has been upheld by the Court of Appeal and the Federal Court. The ratio decidendi in that decision clearly deals with the question of intervenors and whether an application for intervention may be entertained where the proceedings had already concluded; and not about s 96(3), be it the terms or the notice requirements. In fact, the Court of Appeal in *Rasip Hamsudi* went so far as to describe those observations to be per incuriam.

[40] On the other hand are the decisions of *Kumari Nadason* and *Rasip Hamsudi*, relied on by the respondent. Both decisions were decided after the High Court decision in *Azhar*; on 20 March 2014 and 28 November 2016 respectively whereas the High Court decision was decided earlier on 22 November 2013.

[41] Once again, the Court of Appeal in *Kumari Nadason* was confronted with an appeal on an intervener application which was allowed by the High Court. A declaratory order declaring the relevant insurance policy void and unenforceable had been obtained by the insurance company in proceedings taken against the insured, Kumari a/p Nadason. Rajendran a/l Sinakolandai who was paralyzed as a result of serious injuries sustained in an accident involving Kumari's motorcycle and had commenced action at Sessions Court at Sepang, applied to intervene and set aside the declaration granted.

[42] Both orders were granted by the High Court.

[43] At the Court of Appeal, the majority identified the following principal issues: (a) whether the High Court was bound by the decision in *Hong Leong Bank Bhd* (*formerly known as Hong Leong Finance Bhd v Staghorn Sdn Bhd and*

other appeals ('Staghorn')); (b) whether the application ought to have been dismissed since there was no existing proceeding for Rajendran to intervene; and (c) whether the High Court's interpretation of s 96(1) and (3) of the RTA was correct.

[44] On the first two issues, the Court of Appeal applied *Staghorn* and found that Rajendran 'should have filed a fresh action to challenge the declaratory order' since the 'High Court Judge had become functus officio upon the declaratory order being sealed and perfected'. According to the Court of Appeal, there was 'no legal basis to allow the applicant to intervene in a proceeding which had come to an end' — see paras 52–53.

[45] The Court of Appeal went on to deal with the third issue on the interpretation and construction of ss 96(1) and (3), finding the High Court's interpretation to be erroneous. It was not in dispute that the notice of the declaratory order proceedings were never served on Rajendran. In this regard, the Court of Appeal categorically held:

> (58) *By virtue of the proviso to subsection 96(3), the insurer was therefore NOT entitled to the benefit accorded to an insurer under subsection 96(3)*.
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> (59) In other words, should the applicant (who was the plaintiff in the proceedings in the Sepang Sessions Court) succeed in his claim against Rajendran and the insured in the Sessions Court, the insurer was under an obligation, by virtue of subsection 96(1) of the RTA, to pay the applicant, notwithstanding the fact that by the declaratory order the insurance policy in question had been declared void and unenforceable. That declaration was relevant and had effect only as between the Insurer and the Insured.
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> (60) In our view, the statement of the learned High Court judge in Her Ladyship's judgment that: Since the declaratory order has the effect of voiding and rendering unenforceable the insurance policy of the defendant this means that the applicant would not be able to enforce any judgment he may obtain at the Sepang Sessions Court, against P&O pursuant to s 96(1) of the Act' was clearly erroneous in the light of the clear provisions of sub-s 96(1) read together with sub-s 96(3) of the RTA.
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> (61) The service of the originating summons on the applicant within the stipulated time would only be to the insurer's advantage, not the applicant's. *By NOT serving the originating summons on the applicant the insurer had in fact, placed itself in a position that would not enable it to take advantage of subsection 96(3) of the RTA*. (Emphasis added.)

[46] It was precisely due to the insurance company's non-service of the notice required under the proviso to s 96(3) that led the court to the above conclusions, and for the Court of Appeal to add that 'there was nothing that would be gained by the applicant, in fact, in seeking to intervene in the declaratory order proceedings'. For those particular reasons, the majority held

that the application to intervene should have been dismissed. Consequently, both orders of the High Court were set aside.

[47] On a careful reading of the minority judgment which allowed the appeal in part, it is clear that David Wong Dak Wah JCA (as His Lordship then was) was actually in agreement with the views expressed by the majority in respect of the interpretation and construction of s 96(1) read with 96(3). At para 84, His Lordship said:

> (84) Firstly, let me say that *I agree* with the learned High Court judge that the originating summons wherein the appellant obtained *the declaratory order should have been served on the applicant*. I echo the learned High Court judge's reasons that since *the declaratory order has the effect of voiding and rendering the insurance policy unenforceable, it was therefore important that the originating summons be served on the applicant as the aggrieved party in this context*. Further it is not insignificant that this declaratory order was obtained when the sepang trial was in progress. *The manner in which it was done was less than satisfactory. It is like what learned counsel for the second respondent submits and that is it was done 'behind their back'. That cannot be how modern litigation should be conducted*. In the case at hand, the liability of the appellant is a statutory one and there is little doubt that the second respondent relies on the insurance policy to recover whatever judgment he may obtain. (Emphasis added.)

[48] Where His Lordship departed from the majority was in respect of the issue of the right to intervene. His Lordship found that Rajendran had a right to intervene; distinguishing the '*Staghorn* rationale ... on the ground that in that case, it concerned with a judgment obtained after full arguments on the merits of the issues in dispute. In our present case, it was a judgment in default where there was no determination of the merits of the case'. His Lordship further opined that:

> (87) ... the circumstances before us provides a good ground to make this case an exception to the Staghorn rationale. In the case before us, we are dealing with a statutory liability where the appellant by law is compelled to pay the insured sum (which is the product of an insurance policy between the first respondent and the appellant) if the first respondent is found liable to pay for the accident.
>
> (88) I cannot accept the contention of the appellant's counsel that this declaratory order does not bind the second respondent. If it does not bind, then what is the purpose of obtaining the declaratory order before the end of the Sepang Sessions Court trial. It defies common sense.
>
> (89) Another reason why the second respondent should be allowed to intervene is simply that the second respondent has a legal interest in the declaratory order in that his ability to recover any judgment he may obtain will be taken away without him being heard. Again that defies common sense and contravene the basic principle of the right to be heard when his or her legal interest may be taken away. It is trite law as per *Pegang Mining Co Ltd Choong Sam & Ors* [1968] 1 MLRA 925; [1969] 2 MLJ 52, that a party may be added if his 'legal interests' will be affected by the judgment

in the action but not if his commercial interests alone would be affected.

(90) as to whether the second respondent can intervene after judgment I need only refer to the case of *Sistem Penyuraian Trafik KL Barat Sdn Bhd v Kenny Heights Development Sdn Bhd & Anor* [2009] 1 MLRA 674; [2009] 3 MLJ 809; [2009] 4 CLJ 57 at p 79 where this court held that the court has all along been magnanimous in allowing an applicant who has an interest in the subject matter the right to intervene even after final judgment has been entered. (see *EON Bank Bhd v Pung Chong Thai* [2000] 4 MLRH 430; [2001] 5 MLJ 409; [2001] 5 CLJ 468 and *Ang Tun Cheong v Lim Yoek Beng (Public Bank, Intervenor)* [2002] 2 MLRH 831; [2002] 6 MLJ 153; [2002] 8 CLJ 29). The learned judge in those two cases refer to the principles of equity in allowing the interveners to intervene. I can see no clearer case of 'equity' here to allow the intervention.

[49] With that approach, His Lordship opined that the consequential order must be for the appellant to amend the pleadings to include Rajendran, an exchange of affidavits and for the High Court to then adjudicate on whether the declaratory order sought ought to be granted.

[50] Thus, we can only conclude that the decision in *Kumari Nadason* does not support the appellant's propositions. That decision must be properly read and understood; and its full facts be appreciated before the decision may be cited and relied on.

[51] In sharp contrast is the unanimous decision of the Court of Appeal in *Rasip Hamsudi*. We find in that decision, the principles at play when dealing with s 96, in particular, s 96(3) and its proviso, no better and clearer discussed. The factual circumstances and proceedings taken by the parties in that decision almost mirror those in the present appeal.

[52] Factually, was an underlying tort claim by the pillion rider (Rasip) of one of two motorcycles who had sustained serious injuries as a result of an accident between two motorcycles. Rasip and his parents sued both the rider and owner of the other motorcycle. The appellant insurer intervened and was added as a further defendant in that civil action filed at the Selayang Sessions Court. While that civil claim was on-going, the insurers commenced proceedings by way of an originating summons seeking a declaratory order under s 96(3) of the RTA, that the relevant insurance policy was void and unenforceable. The insurers served the cause papers on the insured owner who did not object to the application. The declaration was granted.

[53] Rasip and his parents then filed an originating summons seeking a declaration to quash the declaratory order obtained by the insurers. They complained of not being named or served with the cause papers filed by the insurers despite the insurers knowing of their pending claim at the Selayang

Sessions Court. It was alleged that the omissions were material as the allegations of fraud, relied on by the insurers to negate liability under the insurance policy included allegations of fraud on Rasip's part and/or his parents as well.

[54] The application was allowed by the High Court. The learned judge found that the 'two crucial pre-requisites' under s 96(3) of the RTA 1987 had been satisfied; namely that the declaratory order was obtained before the date the liability was incurred, that is, before judgment was entered at the Selayang Sessions Court in favour of Rasip; and that those proceedings were still pending when the insurers sought its declaratory order.

[55] The High Court further noted that since the notice requirements under the proviso to s 96(3) had not been met, the insurers 'cannot disentitle the plaintiffs of their third party statutory rights found in s 96(1) of the Road Transport Act 1987, by virtue of the declaratory order. The plaintiffs' statutory rights under s 96(1) of the Road Transport Act 1987, are fully preserved notwithstanding the declaratory order'. The insurers 'are not entitled to the benefit of the declaratory order as against the judgment obtained by the plaintiffs in the Sessions Court Suit provided that the plaintiffs shall have complied with the statutory requirements of s 96(1) and (2) of the Road Transport Act 1987'.

[56] The decision was affirmed on appeal. The Court of Appeal agreed with the High Court that since the declaratory order obtained by the insurers was intended to nullify the insurance policy, without which the insurers would have been statutorily obliged to satisfy the judgment obtained, the obligation to serve the 'cause papers' was a 'mandatory requirement under the proviso to s 96(3) of the RTA (to be served with notice together with grounds relied)' — (see para 23); and that it was 'clearly incumbent on the appellant to give notice of the proceedings under *Saman Pemula*-1 (together with the grounds relied upon) to the first, second and third respondents and this the appellant had conceded had not been done' (para 38).

[57] The Court of Appeal had further noted at para 21 that it 'was almost significant ... that in the Proviso itself it was spelt out that such third party (plaintiff) if duly given the stipulated notice (with the grounds being relied upon) was entitled as a matter of right (at the sole option of such third party) be made a party to the proceedings brought by the insurer'. Since it was not in dispute that the Rasip and his parents had not been served with the requisite notice, the declaratory order obtained by the insurer declaring that the insurance policy was void and unenforceable 'was clearly in violation of the provisions of s 96(3) of the RTA. The appellant's omission therefore amounted to not just an infringement of that statutory provisions but had the effect of

denying the first, second and third respondents of their right to be made a party and be heard on the matter in *Saman Pemula*-1. There were no two ways about this'.

[58] We fully agree with and adopt that view.

[59] The decision of *Azhar* and all its nuances as submitted before us in this appeal was also cited to the Court of Appeal in *Rasip Hamsudi*; with counsel for the insurers pointing out that since the decision was affirmed on appeal and that an application for leave to appeal had been refused by the Federal Court, the doctrine of stare decisis applied to obliged the court to follow that decision. The Court of Appeal refused, citing several reasons.

[60] Amongst them was the fact that the decision in *Azhar* was distinguishable in that proviso to s 96(3) 'never featured or ... discussed'; that the focus in *Azhar* was the matter of intervention. In any case, the Court of Appeal disagreed with the observations of the High Court in *Azhar* finding them 'inconsistent with other decided case authorities pertaining to the right of a third party to recover from the Insured monies ordered under a judgment entered against their insured'; and that the conclusions in *Azhar* 'that the plaintiff(s) had no legal interest to intervene until a judgment was secured in their favour and/or there was no right to be served any cause papers until conclusion of the trial in the pending suit was clearly made per incuriam and in total disregard of the express terms in the relevant s 96(3) of the RTA'.

[61] Similarly, we find the terms of s 96 including the proviso to s 96(3) to be obviously plain and clear. And, the court should not overreach itself and interpret the terms beyond its plain intent; worse to do violence to the language found in the statute at hand. Third party insurance is mandatory and third parties who are injured as a result of an insured's acts or omissions are statutorily assured and protected of their right to enforce any judgment granted in their favour against the insurer. This was recognised in all the authorities discussed above and also by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy*.

[62] Consequently, since it is an uncontroverted fact that the appellant did not serve, name or even notify the respondent of the proceedings which led to them procuring the declaration, where such failure or omission clearly contravenes the mandatory requirements of the proviso to s 96(3), the learned judge was perfectly entitled to allow the respondent's application and grant the declaration in the terms sought. The appellant approached the High Court in separate collateral proceedings whilst the tort claim was pending in the Kulim Magistrates' Court and for reasons best known to itself, chose not to inform the respondent. The appellant only cited the insured, and that can only be because

it was seeking to invalidate a contract between itself and the insured. In such a case, the insured must obviously be cited.

[63] However, the position is very different when it comes to third parties such as the respondent. Section 96(3), especially the proviso, seeks to safeguard the interests and rights of third parties; that they must be notified and told of the grounds upon which the validity of the insurance policy was impugned. Had the appellant complied with the notice requirements of the proviso to s 96(3), and the respondent did not attend, then it would not be open to the respondent to complain.

[64] The notice requirements further obliges the appellant to state the grounds for avoiding the insurance policy; and this is in relation to the respondent. In our view, the matter of fraud and such like complaints of the appellant are best taken in those proceedings where the matter may be properly and fully canvassed before the validity of the insurance policy may be determined. The tort claim before the Kulim Magistrates' Court are simply not where legislation has seen fit to try such issues; and logically so. The sessions court sits to adjudicate on the personal injury claim; as the matter of validity of the policy has been carved out by s 96(3) to be determined by way of another legal process and in separate proceedings.

[65] We add that the respondent always retain a right to enforce any successful judgment against the insured. The respondent does not require a declaratory order for that purpose. That seems obvious. The position is however different when it comes to the appellant and the reasons have already been discussed.

CONCLUSION

[66] And, so when we return to the appellant's complaints, we find none of them founded or of any merit. Contrary to the submissions of learned counsel for the appellant, the High Court was not bound by the decision of *Letchumanan* and *Kumari Nadason* as these cases were of no application and in any event were distinguishable.

[67] The High Court was, of course, entitled to follow the Court of Appeal decision of *Rasip Hamsudi*. In fact, it was bound by that decision by virtue of the doctrine of stare decisis. And, as for the allegation that the respondent's claim is a fraudulent claim and the like, that is best thrashed out in the appellant's own application for a declaratory order that the insurance policy is void and unenforceable for those very same reasons. There is already specific legislation in place for where and how such issues are to be dealt with; and not

to be enmeshed in a civil tort claim which has really nothing to do with that issue.

[68] The appellant was well aware of that procedure in s 96(3) and the obligation to serve a notice together with the grounds relied on for avoiding its obligations to satisfy a judgment obtained by a third party. In fact, at no time did the appellant plead ignorance of that duty; it just takes the position that its action was valid. Furthermore, this is not a case of timing of such applications, that is, when such orders ought to be sought. And, yet, the appellant failed and/or ignored that obligation. It has only itself to blame.

[69] Thus, we unanimously conclude that the mandatory requirements in the proviso to s 96(3) have clearly not been met by the appellant. As a result of that non-compliance, and in relation to the respondent, the appellant clearly cannot avail itself of the benefit of s 96(3). The appellant is not entitled to the benefit of s 96(3) of the Road Transport Act 1987.

[70] The orders sought and the declaration granted by the High Court on 2 December 2018 in favour of the respondent are thus in order, and are correct on the facts and in law. We have no reason at all to disturb the decision of the learned judge and we thus dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Dzulqarnain bin Ab Fatar